IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 78 OF 1998
IN
NOTICE OF MOTION NO. 2782 OF 1994
IN
SUIT NO. 2753 OF 1989

M/s. Prabhudas Hirji & Co.,)
a Partnership firm carrying on business at)
223, Samuel Street, Vadgadi,Bombay-400 003)
and also carrying on business at 89, Mittal Chambers,)
Nariman Point, Bombay-400 021.)...Appellants

Versus

1. The Board of Trustees of the Port of)
Bombay, a body corporate constituted under the)
provisions of the Major Port Trust Act, 1963 as)
amended under the provisions of the Major Port)
Trusts Act, 1974 and having their office at)
Vijay Deep, Shoorji Vallabhdas Marg,)
Ballard Estate, Bombay-400 038.)

2. M/s. Forbes Forbes Campbell & Co. Ltd.)
a Limited Company incorporated under the)
Companies Act, 1956, and carrying on)
business at Forbes Building, Charanjit Rai Marg,)
Bombay-400 001)..Respondents

Mr. Archit Jayakar with Ms. Shweta Jaydev, instructed by M/s. Khaitan & Jayakar, for the appellants.

Mr. U.J. Makhija with Mrs. Motiwalla, instructed by M/s. Motiwalla & Co., for respondent No.1.

CORAM: R.M. LODHA &
ANOOP V. MOHTA, JJ.

DATE: JANUARY 24, 2006.

ORAL JUDGMENT (Per R.M. LODHA,J.)

The defendants are in appeal, being aggrieved by the order of the learned single Judge refusing to set aside the decree dated 22nd September, 1997. That came to be passed against the defendants under Order VIII Rule 10 read with Rule 5 (2) of the Code of Civil Procedure.

2. The learned single Judge relied upon two decisions of this Court in the case of *State Bank of India* vs. *Himalayan Tiles and Marble Pvt. Ltd. and Others.,* reported in 1994 Mh. L.J. 31 and *M/s. R.S.Enterprises & another* vs. *Union of India*, in Appeal No. 169 of 1994 in Notice of Motion No. 2004 of 1991 in Suit No. 1573 of 1987 dated 31st March, 1994, and held that Notice of Motion was not maintainable.

3. Mr. Archit Jayakar, the learned counsel for the appellants, relied upon the judgment of the Supreme Court in the case of *Prakash Chander Manchanda and another* vs. *Smt. Janki Manchanda,* AIR 1987 SC 42, and the judgment of the Delhi High Court in the case of *Gujrat Co-operative Oil Seeds Growers Federation* vs. *Smt. Ramesh Kanta Jain*, AIR 1994 Delhi 367, in support of his contention that the learned single Judge was not right in holding that the Notice of Motion was not maintainable. The learned counsel also relied upon the judgment of the Kerala High Court in the case of *M/s. M. Manick Peter and others* vs. *K. Surendranathan*, AIR 1988 Kerala 161 and the judgment of Orissa High Court in the case of *Shantilata Pattanaik* vs.

London Baptist Mission Corporation and another, 2000 AIHC 4968, in support of his submission that application to set aside under Order VIII Rule 10 read with Rule 5 (2) C.P.C. is maintainable under Order IX Rule 13.

4. On the other hand, Mr. U.J. Makhija, the learned counsel for the first respondent, submitted that the Division Bench of this Court has held in unambiguous terms that the decree passed under Order VIII Rules 5 and 10 of the C.P.C. cannot be set aside by filing an application under Order IX Rule 13 of the C.P.C. He relied upon the judgment of this Court in the case of *Dhanwantrai R. Joshi and others* vs. *Satish J. Dave and others,* 1998 (3) Mh. L.J. 924.

5. We considered the submissions of the learned counsel for the parties.

6. In *Prakash Chander*, the Supreme Court considered the provisions of Order XVII Rules 2 and 3 and Order IX Rule 13 C.P.C. and held thus:

> "It is clear that in cases where a party is absent only course is as mentioned in O.17 (3) (b) to proceed under R.2. It is therefore clear that in absence of the defendant, the Court had no option but to proceed under R.2. Similarly the language of R.2 as now stands also clearly lays down that if any one of the parties fails to appear, the Court has to proceed to dispose of the suit in one of the modes directed under O.9. The explanation to R.2 gives a discretion to the Court to proceed under R.3 even if a party is absent but the discretion is limited only in cases where a party which is absent has led some evidence or has

> examined substantial part of their evidence. It is therefore clear that if on a date fixed, one of the parties remain absent and for that party no evidence has been examined upto that date the Court has no option but to proceed to dispose of the matter in accordance with O.17 R. 2 in any one of the modes prescribed under O.9, Civil P.C. It is therefore clear that after this amendment in O. 17 Rr.2 and 3, Civil P.C. There remains no doubt and therefore there is no possibility of any controversy. In this view of the matter it is clear that when in the present case on 30-10-1985 when the case was called nobody was present for the defendant. It is also clear that till that date the plaintiff's evidence has been recorded but no evidence for defendant was recorded. The defendant was only to begin on this date or an earlier date when the case was adjourned. It is therefore clear that upto the date i.e. 30-10-1985 when the trial court closed the case of defendant there was no evidence on record on behalf of the defendant. In this view of the matter therefore the explanation to O.16 R.2 was not applicable at all. Apparently when the defendant was absent O.17 R.2 only permitted the Court to proceed to dispose of the matter in any one of the modes provided under O.9."

7. In *Prakash Chander*, the Supreme Court was not concerned with the question whether Order IX Rule 13 of the C.P.C. is applicable where the trial Judge passes the judgment for want of written statement under Order VIII Rule 10 read with Rule 5 (2) of the C.P.C.

8. It is true that the Delhi High Court, Andhra Pradesh High Court and the Orissa High Court, in the cases above referred, had taken the view that the judgment passed under Order VIII Rule 10 and Rule 5 (2) for want of written statement amounts to ex parte decree and, therefore, provisions of Order IX Rule 13 C.P.C. can be invoked. But in so far as this Court is

concerned, the question is no more *res integra* as in *Dhanwantrai R. Joshi,* the Division Bench of this Court was directly concerned with the question on reference, as to whether a decree passed under Order VIII Rule 5 or 10 of the C.P.C. can be set aside by filing an application under Order IX Rule 13 of the C.P.C.

9. The Division Bench referred to the provisions contained in Order VIII and Order IX of the C.P.C. and held that considering the scope of Order VIII Rule 5 or Rule 10 as well as Order IX, it was apparent that both operate in different fields. With reference to Order IX and the word *ex parte*, the Division Bench of this Court in paragraph 8 of the report observed thus:

> "8. from the aforesaid judgment, it is clear that the word 'ex parte' has specific connotation and for that procedure is prescribed under Order IX, Rule 6. Under Rule 6, if the Defendant fails to appear when the suit is called out for hearing and if it is proved that the summons was duly served, then Court can make an order that the suit be heard *ex parte* and record the evidence and pass a decree. Order IX nowhere provides that on the basis of the averments made in the plaint, Court can pass a decree. Court has to proceed with a suit in absence of the defendant and try the suit and pass appropriate decree. Further the order of *ex parte* hearing also could be set aside under Rule 7, if good cause is shown for non appearance. Similarly, under Rule 8, when Defendant appears and Plaintiff fails to appear, the Court may dismiss the suit, unless the defendant admits the claim or part thereof, and in that case the Court is required to pass a decree against the defendant upon such admission. Similar are the provisions under Rule 10 and Rule 11, in case of non-attendance of one or more of several Plaintiffs or Defendants respectively. Rule 12 provides for

> consequence of non-attendance by the Plaintiff or the Defendant, who has been ordered to appear in person. In this context, if Rule 13 of Order IX is considered, it would be clear that the phrase "in any case in which decree is passed *ex parte* against defendant" would mean and apply in those cases where the Court has proceeded and passed an order under Rule 6 and has passed a decree after recording evidence. That means a decree is passed after hearing the Plaintiff in absence of the Defendant. With regard to dismissal of the suit or passing of decree on admission, as provided under Rule 8, there are specific provisions for setting aside such decree in Rule 9, which provides that if sufficient cause for non-appearance when the suit was called out for hearing is shown, the Court is empowered to make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit and thereafter the Court is required to proceed with the suit."

10. Order VIII of the C.P.C. was analysed, inter alia, in paragraph 9 by the Division Bench of this Court thus:

> "As against this, Order VIII provides that if Defendant is served with the summons, then he is required to file a written statement and if the Defendant fails to file a written statement, discretion is given to the Court to pass a decree on the basis of the averments made in the plaint. For this purpose, Rule 5 of Order VIII is clear. Order VIII, Rule 5 (2) provides that if the defendant has not filed pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the Plaint. However, passing of such decree depends upon the discretion of the Court and Court may insist the Plaintiff to prove certain facts."

11. Dealing with two different provisions contained in Order VIII and Order IX, the Division Bench held thus:

> "Order VIII,Rule 5 specifically provides that if Defendant fails to file Written Statement as contemplated therein, the Court may pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, or the Court may in its discretion, require any such fact to be proved. If the judgment is pronounced on the basis of the facts contained in the plaint, decree is to be drawn in accordance with Order VIII, Rule 5 (4). Similarly, if a party from whom written statement is required under Order VIII, Rule 10, fails to present the same within the time permitted or fixed by the Court, the Court is entitled to pronounce judgment against such party, or make such order in relation to the suit as it thinks fit. If the judgment is pronounced, the decree is required to be drawn up. Such decree pronounced on non filing of Written Statement cannot be considered to be an *ex parte* decree as contemplated under Order IX, Rule 6. These types of decrees are passed because of failure to file Written Statement. Further, in a case where Written Statement is not filed and at the time of hearing, even if the defendant is present, the Court is entitled to pronounce the judgment and pass decree. If the Defendant is absent and the Written Statement as required is not filed, the Court is also entitled to pronounce judgment on the basis of the averments made in the plaint."

12. In the light of the aforesaid consideration by the Division Bench of this Court, no doubt is left that an application under Order IX Rule 13 of the C.P.C. is not maintainable where judgment/order has been passed by the trial Judge for want of written statement invoking Order VIII Rule 5 or Rule 10, as the case may be. In the opinion of the Division Bench of this Court, the presence or absence of the defendant is not material where the written statement is not filed and the court pronounced the judgment under Order

VIII Rule 10 or Rule 5 (2) of the C.P.C. We find ourselves in agreement with the view of Division Bench in the case of *Dhanwantrai*.

13. Mr. Archit Jayakar, the learned counsel for the appellants, would submit that even if the application under Order IX Rule 13 was not maintainable, the application ought to have been considered under Section 151 of the C.P.C. for setting aside the decree passed by the learned trial Judge for want of written statement. He relied upon the observations of the learned single Judge of the Orissa High Court in the case of *Shantilata Pattanaik*.

14. It is true that the learned single Judge of the Orissa High Court in *Shantilata Pattanaik* did observe that even assuming that the petition under Order IX Rule 13 was not maintainable, petition under Section 151 of the C.P.C. could be filed and the petition under Order IX Rule 13 would have been treated to be one under Section 151 of the C.P.C. What made the learned single Judge to make such observations are not discernible from the said judgment. We are unable to accept such observation of the learned single Judge of the Orissa High Court. In our considered view, Section 151 of the C.P.C. cannot be invoked for setting aside the judgment/decree passed under Order VIII Rule 5 (2) and 10 of C.P.C. for want of such specific provision in Order VIII itself.

15. We find ourselves in agreement with the view of Division Bench in the case of *Dhanwantrai* and in view thereof find no infirmity in the impugned order.

16. The appeal is accordingly dismissed with no order as to costs. However, dismissal of this appeal shall not preclude the appellants from challenging the impugned judgment/order by filing an appropriate appeal and if such appeal is barred by time, explain such delay by sufficient cause or the exclusion of the time during which the appeal remained pending.

(R.M. LODHA, J.)

(ANOOP V. MOHTA, J.)